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No. 80-427

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FAIR ASSESSMENT IN REAL ESTATE ASSOCIATION, INC., J. DAVID CASSILLY, and LYNN F. CASSILLY,

Petitioners,

v.

GENE MCNARY, WILLIAM A. SKAGGS, EDMUND J. PUNG, CHARLES T. SCHNEIDER, FRANK J. ANTONIO, DONALD G. WILLIAMS, TOM R. OTTO, and STEPHEN C. SNYDER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

ARGUMENT

Respondents have made such arguments as one can to support their view that the Tax Injunction Act, 28 U.S.C. §1341, bars Petitioners' damages action. In addition, they have appealed to the Court to decide, as a legislative matter, whether Petitioners' action *should* be cognizable in federal court. Thus, Respondents have broadened the inquiry here beyond an exploration of the Tax Injunction Act to a search for some ambiguous principle of social policy that they contend would sup-

port barring the federal courts from exercising jurisdiction in this litigation. In doing so, Respondents have appealed, with marginal respect for precedent, to the doctrine of comity, equity, and federalism, and to the doctrine of exhaustion of judicial and administrative remedies.[1]

At bottom, Respondents contend that Petitioners' lawsuit invites the federal courts to insert themselves, inappropriately, into state assessment and taxation matters. Petitioners reply that neither the reasons nor the precedents supporting the doctrines to which Respondents draw the Court's attention (nor those supporting the Tax Injunction Act) justify barring this matter from proceeding to trial on the merits. Beyond doubt, those doctrines do place limits on federal jurisdiction in 42 U.S.C. §1983 claims. But, Petitioners' claim is squarely within the mainstream of traditional §1983 claims over which the federal judiciary has actively exercised jurisdiction.

I. The Doctrine Of Comity, Equity, And Federalism Is Inapplicable To Petitioners' Action At Law For Damages.

In *Younger* v. *Harris,* 401 U.S. 37 (1971), the Court enunciated the doctrine of comity, equity, and federalism, that is, that the federal courts would abstain, except in extraordinary circumstances not claimed here, from enjoining pending state criminal prosecutions. In so deciding, the Court rested its position on the considerations of "equity jurisprudence" that preclude equitable relief in instances in which there are adequate remedies at law, and notions of "comity" that call for a proper respect for state functions as separate and distinct from federal. 401 U.S. at 43-44.

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[1]Reference to "Respondents" is to all Respondents herein. Reference to the "McNary Respondents" is to Respondents McNary, Skaggs, Antonio, Pung, and Schneider as they have stated their positions in their joint brief, and reference to the "Williams Respondents" is similarly to Respondents Williams, Otto, and Snyder.

Petitioners suggest that the doctrine of comity, equity, and federalism is inapplicable to bar federal jurisdiction here for two reasons: First, equity jurisprudence and comity considerations that sometimes dictate federal court abstention are not present here, and second, the Court has never extended the doctrine to bar actions other than those that were equitable in nature.

A. Considerations of equity jurisprudence.

The considerations of equity jurisprudence are essentially the same as those expressed in the cases contemporaneous with and preceding enactment of the Tax Injunction Act and with the legislative history of that act. *See, e.g., Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293, 300 (1943); *Matthews* v. *Rodgers,* 284 U.S. 521, 525 (1932), and the legislative history of the Tax Injunction Act detailed in Part III of Petitioners' brief in chief. Just as those considerations did not support finding that the Tax Injunction Act is a bar to this case (*see* Petitioners' Brief at 26-27, 32-34), they do not suggest that the doctrine of comity, equity, and federalism should bar this case. This is true for the simple reason that Petitioners are not requesting that the Court permit the district court below to exercise its equity jurisdiction. This is an action at law for damages.

B. Considerations of comity.

The concern for comity, at least in respect to challenges to some administrative state functions like assessment and taxation, can perhaps best be discerned by examining two of the Court's decisions, *Rizzo* v. *Goode,* 423 U.S. 362 (1976), and *Huffman* v. *Pursue, Ltd.,* 420 U.S. 592 (1975). Taking these two cases together, the Court has said that the federal judiciary should not intervene by exercising its equity power to participate in the formulation of state judicial or administrative programs—for example, the organization of citizen complaint procedures regarding police misconduct in the case of *Rizzo* and control of pornographic movie theaters in *Huffman.* In the area

of state taxation, these cases suggest that the federal judiciary should not exercise its equity authority to instruct state and local officials on the method by which they will eliminate costitutionally infirm taxation practices. Instead, and except in extraordinary circumstances, injured taxpayers should confine their efforts to reform assessment and taxation programs to efforts within the state administrative, judicial, and political systems.

Petitioners here, however, have presented a quite different litigation. Petitioners have sued individuals, not a state agency, for the damages those individuals have caused Petitioners in intentionally and systematically depriving Petitioners of their constitutional rights. If Petitioners prevail, they will obtain damages that include both the amount of the excessive taxes imposed upon them and the amount by which they were otherwise injured as a result of being subjected to the wrongful discrimination.[2]

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[2]In their briefs, both sets of Respondents have asserted erroneously that the claim of Petitioners J. David and Lynn F. Cassilly (the only Petitioners upon whose claims this case turns, *see* Petitioners' Brief at 6-8) is only for (1) the amount by which they were taxed excessively and (2) punitive damages. Williams Respondents' Brief at 2, 19-20; McNary Respondents' Brief at 4, 10-11. This is obviously wrong in respect to Petitioners' Second Claim for Relief (J.A. 10-12), where the amount of excessive taxation may not even be a proper measure of the damages incurred. While the McNary Respondents finesse that question altogether, the Williams Respondents recognize their effort to characterize Petitioners' claims as merely for tax refunds fails when considering the Second Claim for Relief. Therefore, they undertake at page 20 of their brief to respond to the claim by asserting, without authority, that the claim "is totally without substance upon its face." Such an assertion improperly invites the Court to determine in this proceeding whether Petitioners have failed to state a claim upon which relief may be granted as a matter of substantive law when the determinations below have been confined to the question of jurisdiction. That improper invitation by the Williams Respondents is necessitated, however, by the great effort that they make to establish that Petitioners' case is naught but a tax refund action into which some punitive damage claim has been thrown.

If Petitioners prove the requisite malicious conduct, they will also win punitive damages. And, no damage judgment can be rendered in this case forcing any payment from public funds to Petitioners. Moreover, Petitioners have not asked the court to establish new standards within which Respondents are to act in order to avoid violating Petitioners' civil rights. Instead, Petitioners have claimed damages for Respondents' knowing, intentional, and malicious prior violations of Petitioners' civil rights.

In deciding Petitioners' case, the court will not be required to appraise the value of property—a question more properly within the state administrative taxing authority. Rather, to prevail Petitioners must prove that they were placed in a class (new home owners) that was impermissibly distinguished from a broader class (home owners) and that their impermissible class was treated materially and injuriously different from the broader class. They allege that material injury results from their class being assessed at the rate 33 1/3 percent of the appraised value of homes, rather than 22 percent, the rate applied in the broader class. Thus, determination of their damages arising out

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Even if the Williams Respondents' inappropriate invitation in respect of the Second Claim for Relief had any merit, one is faced with the fact that the damages claimed in the First Claim for Relief are *not* limited to the amount by which Petitioners were excessively taxed and punitive damages. While the claims were so limited for the tax years 1975 and 1976, they were not for the tax years 1977, 1978, and 1979. A comparison of the allegation of the amount by which Petitioners should have been taxed in paragraph 29 of Petitioners' complaint with the prayers for relief for the First Claim manifests damages in excess of the excessive taxation in the amount of $600 for 1977, $288 for 1978, and approximately $500 for 1979. J.A. 10-13. Dismissal of the lawsuit prior to discovery and presentation of the merits may have contributed to Respondents' respective confusion. The fact remains, however, that in addition to claiming excess taxes as damages, Petitioners have claimed as damages (1) additional injuries resulting from their having suffered discriminatory taxation in 1977, 1978, and 1979, (2) injuries resulting from their having been singled out and reassessed as taxpayers who successfully appealed in prior years, and (3) punitive damages.

of excessive taxes neither supplants nor requires the expertise-dependent activity of appraisal. It requires only the mechanical analysis of which ground rule applies.

In fact, Petitioners have stated a garden variety §1983 damages action. To state such a claim, "two—and only two—allegations are required" under the statute:

> First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. *Gomez* v. *Toledo,* 446 U.S. 635, 640 (1980), *citing Monroe* v. *Pape,* 365 U.S. 167, 171 (1961).

Thus, the comity consideration is reduced to the concern that somehow holding public officers liable for damages for their willful, intentional, and systematic discrimination against Petitioner taxpayers constitutes an inappropriate intrusion of the federal judiciary into state assessment and taxation programs. Petitioners will demonstrate below that the Court has never found such a minimal consideration sufficient to abstain. Moreover, they submit that such abstention is unnecessary in these circumstances because three further considerations provide safeguards to limit any danger that may be implicit in creating such potential for liability.

First, as Petitioners point out in Part V of their brief in chief, Respondents are protected by official immunity. They are not exposed to liability unless they are guilty of bad faith conduct toward Petitioners—for example, conduct that is malicious, willful, invidious, intentional, and knowing or in violation of established constitutional rights. *See Wood* v. *Strickland,* 420 U.S. 308, 321-22 (1975).

Second, Petitioners contend that their rights were violated because Respondents systematically singled them out into an impermissible class and prejudicially assessed taxes against that

class. Such allegations impose a heavy burden on Petitioners to demonstrate that the individual Respondents were "palpably arbitrary" or "invidious" in drawing the classification against which Petitioners complained. *Allied Stores* v. *Bowers,* 358 U.S. 522, 530 (1959), *cited in Lehnhausen* v. *Lakeshore Auto Parts Co.,* 410 U.S. 356, 360 (1973). *See Snowden* v. *Hughes,* 321 U.S. 1, 9 (1944):

> Another familiar example [of a potential violation of the Equal Protection Clause] is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws. It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination, which may be evidenced, for example, by a systematic under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by statute.

Third, the risk that §1983 defendants will be made the subject of frivolous actions causing them great expense even though they ultimately prevail was largely eliminated by amendment of 42 U.S.C. §1988. That permitted a court to award attorney's fees as well as costs to a prevailing party in §1983 actions.

In summary, the reasons supporting federal abstention are largely not present in this case. To the extent that there are comity considerations present, other protections of state administrators through the official immunity doctrine, the burdens for plaintiffs to prevail in an equal protection claim, and the power of a federal court to award attorney's fees to protect against abusive litigation, reduce those considerations to a bare minimum.

C. Absence of precedent.

In these circumstances, the Court should not interpose the doctrine of equity, comity, and federalism in this case unless some compelling precedent so requires. The fact is that the precedents do not require such an application. None has gone nearly so far as to bar jurisdiction in a case like the one presented here. The Court has applied the doctrine of comity, equity, and federalism to bar injunctions against criminal prosecutions. *Younger* v. *Harris*, 401 U.S. 37 (1971). It has extended the doctrine to bar injunctive actions in civil proceedings, at least when those proceedings were closely connected with the operation of the criminal laws. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592 (1975). It has further extended the doctrine to apply to actions against public officials where the plaintiffs sought the broad exercise of the equity powers of the federal court to supervise management of a police department. *Rizzo* v. *Goode*, 423 U.S. 362 (1976). But, it has never extended the doctrine to actions at law for damges and has never so much as intimated that it plans to.

It is not surprising that Judge Nangle below did not consider the application of the *Younger* doctrine on point in this proceeding. Instead, he cited *Younger* to support the reasonableness of the conclusion that he was drawing under the Tax Injunction Act. *Fair Assessment in Real Estate Association* v. *McNary*, 478 F. Supp. 1231, 1234 (E.D. Mo. 1979), *aff'd*, 622 F.2d 415 (8th Cir. 1980); Pet. App. A-7 to A-8. He recognized that, if there were a bar to this action, it would not be founded upon concepts of comity, equity, and federalism, but upon the Tax Injunction Act.

II. No Requirement Of Exhaustion Of Administrative Or Judicial Remedies Constitutes A Bar To This Action.

Throughout their briefs, Respondents refer to the availability of state remedies and the supposed failure of Petitioners to exhaust them. In doing so, they appear to rely upon three

sometimes intermingled theories. First, they seem to suggest that a failure to exhaust state remedies either does or should, in and of itself, interpose a bar to Petitioners' action being heard in federal court. Second, they seem to suggest that there are available remedies under Missouri law that Petitioners could have pursued, and that that somehow raises the bar of the Tax Injunction Act. Third, they seem to suggest that the absence of an obligation to exhaust state remedies in §1983 actions under the authority of *Monroe* v. *Pape*, 365 U.S. 167 (1961), enhances the persuasiveness of the position that Petitioners' action threatened an undue intrusion by the federal judiciary into matters left more properly to state adjudication.

A. No exhaustion requirement.

The first of these theories is made most prominently by the Williams Respondents in Part II of their brief. They rest primarily on the fact that the Court in *First National Bank* v. *County Commissioners*, 264 U.S. 450 (1924), ruled that certain taxpayers could not press their claims of taxation in violation of the taxpayers' right to protection under the Due Process and Equal Protection Clauses of the Fourteenth Amendment because the taxpayers had not availed themselves of existing adequate state remedies. Reliance on *First National Bank* to impose a duty on Petitioners to exhaust state remedies is surprising and seemingly meritless in light of the Court's subsequent decisions. For example, in *McNeese* v. *Board of Education*, 373 U.S. 688 (1963) and *Monroe* v. *Pape*, 365 U.S. 167 (1961), the Court held that exhaustion of administrative remedies is not a precondition to pursuit of a §1983 claim in federal court. The Williams Respondents' reliance on *Matthews* v. *Rodgers*, 284 U.S. 521 (1932); *Great Lakes Dredge & Dock Co.* v. *Huffmann*, 319 U.S. 293 (1943); *Tully* v. *Griffin*, 429 U.S. 68 (1976); and *Rosewell* v. *LaSalle National Bank*, ____ U.S. ____, 101 S.Ct. 1221 (1981), lends no serious support to this argument. As deminstrated in Part IV of Petitioners' brief, these cases manifest the tradition that the federal courts are barred from ex-

ercising equitable jurisdiction to direct state tax and other state administration—and reflect little more.

Even though relief from the exhaustion doctrine in §1983 cases continues to be the state of the law, *see Wilwording* v. *Swenson*, 404 U.S. 249 (1971) (*per curiam*); *Damico* v. *California*, 389 U.S. 416 (1967) (*per curiam*), some commentators have expressed reservations about the absence of an exhaustion doctrine. For example, in commenting on the line of cases considering the absence of an exhaustion requirement in a §1983 action, Justice (then Judge) O'Connor observed,

> [m]ore recently, however, the Court has stated, "whether this is invariably the case . . . is a question we need not decide." In *Barry* v. *Barchi*, [443 U.S. 55, 63 n.10 (1979)] the Court reaffirmed the *Gibson* v. *Berryhill* [411 U.S. 564 (1973)] holding that exhaustion of administrative remedies is not required when the question of the adequacy of administrative remedies is for all practical purposes identical with the merits of the Section 1983 action. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Judge*, 22 Wm. & Mary L. Rev. 801, 809 (1981) [footnotes omited], *quoting Gibson* v. *Berryhill*, 411 U.S. at 574-75.

Barry, *Gibson*, and other cases may very well have signaled the introduction of a form of exhaustion requirement to some §1983 actions—those that have focused upon alleged violations of the Due Process Clause of the Fourteenth Amendment. Thus, in *Barry*, the Court rejected the defendant's view that the plaintiff should have exhausted administrative remedies since the plaintiff was claiming that the particular process to which he was subject (that of having a harness racehores trainer's license suspended without pre- or prompt post-suspension hearings) was itself the constitutionally infirm procedure. Likewise, in *Gibson*, the Court found that the question of exhaustion of administrative remedies was not relevant where the plaintiff's at-

tack was upon the nature of the constituents of the relevant administrative agency.

Out of this thinking emerges a new line of decisions that does find a certain kind of exhaustion to be necessary. These cases require that a plaintiff exhaust his possible state court remedies before he will be heard to complain that he has lost his federal right to be free from deprivation "of life, liberty or property without due process of law." *See Parratt* v. *Taylor,* ____ U.S. ____, 101 S.Ct. 1908 (1981); *Ingraham* v. *Wright,* 430 U.S. 651 (1977); *Paul* v. *David,* 424 U.S. 693 (1976).

In *Parratt,* the Court would not find a Due Process violation for a prisoner who claimed to have been injured by penal officials who lost the prisoner's $23.50 mail ordered hobby materials, where the plaintiff could have pursued a state sanctioned tort claims procedure to redress the wrong. The Court reasoned that the plaintiff could not reasonably contend that his right to the protection of Due Process was lost when he could have pursued state proceedings to obtain that protection. Thus, *Parratt* teaches that the examination of the availability of due process in a particular case includes a review of both pre-and reasonable post-deprivation procedures that state law provides. *Parratt* does not reintroduce the exhaustion requirement in §1983 actions that the Court excluded in *Monroe* v. *Pape.* As the Court said, "Our decision today is fully consistent with prior cases." ____ U.S. at ____, 101 S.Ct. at 1917. *See also Paul* v. *Davis* (the availability of an action for defamation was sufficient to afford due process where a police official allegedly wrongfully published a plaintiff's picture) and *Ingraham* v. *Wright* (the availability of civil and criminal assault remedies provided adequate due process for a plaintiff who alleged wrongful corporal punishment in a public school).

Legitimate as these cases may be in bringing a measure of an exhaustion-of-state-remedies requirement back into a class of §1983 actions, they are fully inapposite to the instant case.

Here, Petitioners alleged that the individual Respondents have intentionally and systematically singled them out for discriminatory treatment. The alleged violation of the Equal Protection Clause, as well as the Due Process Clause, cannot be remedied by reference to state common law tort. Therefore, the question that Petitioners could conceivably have presented in a state proceeding "is for all practical purposes identical with the merits of [Petitioners'] section 1983 action." O'Connor, *supra*, at 809. Respondents' first suggestion that Petitioners' failure to exhaust state remedies bars their action is simply without merit.

B. Irrelevance of the availability of state remedies.

Respondents' second and third appeals to the relevance of the doctrine of exhaustion of remedies each deserve short shrift. Their second contention in this area is that the availability of state judicial and administrative remedies proves the existence of "plain, speedy and efficient" state remedies, which in turn raises the bar of the Tax Injunction Act. Most assuredly, the availability of adequate state remedies may go a long way to proving the presence of "plain, speedy and efficient" remedies within the meaning of the Tax Injunction Act and result in application of the Act to bar a suit brought in federal court for injunctive relief on matters related to state taxation. But, the presence or absence of plain, speedy, and efficient remedies only determines whether there shall be an exception to the jurisdictional bar once it has been determined that the Act applies. It is that latter question—whether the Tax Injunction Act bars the action—that is at issue here, not whether Missouri tax administration allows for plain, speedy, and efficient remedies.

C. Effect of absence of an exhaustion requirement.

In their third contention, which argues in the exact opposite direction from the first, Respondents would have the Court find a greater justification for the application of the doctrine of comity, equity, and federalism from the absence of an exhaustion requirement. Since exhaustion is not required, the argument

seems to suggest that plaintiffs have a greater opportunity to be heard in federal court in these cases and, therefore, the risk of undue federal intrusion into state administration rises. While the absence of an exhaustion requirement may increase the number of federal cases heard, it does not necessarily follow that that increases the risk of undue federal instrusions. In Part I of this Reply Brief, Petitioners have explored the sort of comity considerations that give rise to the worry about undue federal intrustion. The mere possibility of more cases arising because of the absence of the exhaustion requirement, however, does not help answer the question whether those cases are of the sort that puts the federal courts into administrative matters more properly within the dominion of the states.

Moreover, this argument rests on a classical logical fallacy. The argument goes like this: Congress enacted §1983 to make the federal courts "guarantor[s] of basic federal rights against state power . . . ." *Mitchum* v. *Foster,* 407 U.S. 225, 239 (1972). Therefore, plaintiffs generally need not exhaust their state remedies to pursue a §1983 action. *Monroe* v. *Pape,* 365 U.S. 167 (1963). But (according to Respondents), because there is no exhaustion requirement, the Court should apply *Younger* v. *Harris,* 401 U.S. 37 (1971), and abstain from jurisdiction over §1983 actions. Therefore, the federal courts are barred from hearing such actions and, to that extent, from being "guarantor[s] of basic federal rights against state power . . . ." Catch-22.

All of Respondents' efforts to raise the absence of exhaustion as an issue that would bar the district court's jurisdiction in this action fail.

III. Notwithstanding Respondents' Arguments, the Tax Injunction Act Does Not Bar this Action.

Respondents make several arguments as to which Petitioners have already commented in their brief in chief and make no fur-

ther comment here. Respondents introduce some additional arguments that do require comment. A *seriatum* review of these, however, will disclose that Respondents do not have a convincing case that the Tax Injunction Act bars this action.

A. The Act's language.

The McNary Respondents quarrel with the plain meaning of the statutory language "enjoin, suspend or restrain," but to no avail. First, these Respondents invoke wooden application of a maxim of statutory construction to insist that "enjoin," "suspend", and "restrain" must have distinctly separate meanings in order to avoid "suspend" and "restrain" being surplusage. Yet, the combination of words in the Tax Injunction Act is not an anomaly. Other statutes similarly enumerate closely related judicial powers. For example, in a jurisdictional statute relating to the Interstate Commerce Commission, Congress empowered federal district courts to "enforce, *enjoin,* set aside, annul, [and] *suspend*" certain orders. 28 U.S.C. §1336(b) (emphasis supplied). Perhaps a more appropriate maxim is "noscitur a sociis," that is, that "general and specific words which are capable of an analogous meaning being associated together take color from each other so that the general words are restricted to a sense analogous to the less general." *Dunham* v. *State,* 140 Fla. 754, 758, 192 So. 324, 326 (1939).

Congress has used the various terms interchangeably: While the federal appellate courts have general jurisdiction over proceedings to "*enjoin* or *suspend*" rules, regulations, and orders of the Interstate Commerce Commission pursuant to 28 U.S.C. §2321(a), the statute making that provision applicable to the Department of Agriculture refers to the powers of "*suspending* or *restraining* . . . or setting aside" such orders. 7 U.S.C. §217 (enacted in 1921) (emphasis supplied).

Second, the McNary Respondents arbitrarily pick and choose meanings for the three words, ascribing, on the one hand, an unidentified "legal" meaning to "enjoin" and, on the other,

vernacular definitions from a 1969 Webster's Dictionary to "suspend" and "restrain." Morever, the broad vernacular meaning for "restrain," so enthusiastically embraced by these Respondent, renders "enjoin" and "suspend" superfluous, an outcome inconsistent with these Respondents' insistence on separate meanings.

The Tax Injunction Act delimits federal courts powers. The words are all terms of art denoting direct coercive, or equitable, judicial powers. *See Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293, 299 (1943). Examination of like statutes, such as 28 U.S.C. §1336 and 28 U.S.C. §2342, gives rise to the same inference that the words are used as descriptions of particular forms of equitable powers. A court "restrains" when it issues a restraining order; a court "suspends" when it issues a stay. The McNary Respondents point to no legal authority for a definition of "restrain" as simply anything that has ill effects. There is none.

Instead, Congress's use of "restrain" in §1341 is limited to its meaning as an exercise of equity. Consider its use in a parallel statute enacted contemporaneously with the Tax Injunction Acm. The Agricultural Adjustment Act divests all courts of power to entertain suits having the purpose or effect of "preventing or restraining" or obtaining declaratory judgments regarding the assessment or collection of certain commodity processing taxes. 7 U.S.C. §623. Judicial interpretations of that statute rendered prior to the enactment of §1341 identify it as a restriction on the equitable jurisdiction of federal courts, without a concomitant limitation on jurisdiction over actions at law. *See, e.g., Rickert Rice Milling Co.* v. *Fontenot,* 79 F.2d 700 (5th Cir. 1935); *Grosvenor-Dale Co.* v. *Bitgood,* 12 F. Supp. 416 (D. Conn. 1935). It would be incongruous if Congress subsequently used the narrower language of the Tax Injunction Act to attempt to create a prohibition that extended to legal as well as equitable actions. The Court must infer that in using terms with "an accumulated settled meaning under . . . equity,"

Congress intended to incorporate that established meaning. *N.L.R.B.* v. *Amax Coal Co.*, ___ U.S. ___, ___, 101 S.Ct. 2789, 2794 (1981).

B. Actions for damages contemporaneous with the enactment.

Respondents incorrectly assert that the focus on injunctive relief in congressional deliberations reflected the total absence at the time of actions for damages that involved attacks on state taxation in the federal courts. Though perhaps less notorious than injunctive actions, such federal court damage actions were by no means unknown at the time of the Act's passage. State remedies at law clearly existed, both under the statutory refund schemes described in the legislative history, *see, e.g.*, Sen. Rep. 1035, 75th Cong., 1st Sess. (1937), and under common law tort theories, *see, e.g.*, *McPike* v. *Pew*, 48 Mo. 525 (1871); *Harrington* v. *Glidden*, 61 N.E. 54, 55 (Mass. 1901). Taxpayers invoking diversity jurisdiction could seek these state remedies in the federal courts. At the time that Congress considered the Tax Injunction Act, federal courts, exercising both diversity and federal question jurisdiction, had held state or local tax officials personally liable in damages for wrongfully obtained taxes. *See Tyler* v. *Dane County*, 289 F. 843 (W.D. Wis. 1923); *International Paper Co.* v. *Burrill*, 260 F. 664 (D. Mass. 1919).

Congress is presumed to have known the existing state of the law when it acted. Yet Congress used statutory language that did not divest federal courts of all jurisdiction over state tax related matters. It knew that such actions would survive the prohibition but chose—for whatever reason—to permit that outcome.

C. Lower court decisions.

The Williams Respondents overstate the support for their position to be found in prior judicial interpretations of the Act. They suggest that the lower federal courts have uniformly held

§1341 to bar tax refund actions. Petitioners do not deny that some lower federal courts have so held. In their brief in chief, Petitioners identified both cases in which tax refund actions were barred and those in which such actions were permitted.

Respondents, however, claim too much support for their position by erroneously listing a number of cases without precedential value. For example, *United States* v. *State Tax Commission*, 505 F.2d 633 (5th Cir. 1974), involved injunctive relief exclusively and the court's holding was so limited. In *Gray* v. *Morgan*, 371 F.2d 172 (7th Cir. 1966), the plaintiffs sought injunctive and declaratory relief and a tax refund. The court there held that §1341 bars federal courts from granting the "equitable relief" sought and made no comment on the ancillary tax refund claim. In *Natural Gas Pipeline Co.* v. *Sergeant*, 337 F. Supp. 88 (D. Kan. 1972), the plaintiffs sought injunctive relief that would limit the taxing authority's spending. The court stated that tax refund procedures are integral to state tax administration; it did not consider the permissibility of tax refund actions in federal courts.

Similarly, of the five cases Respondents cite as "specifically holding" that §1341 bars damage actions, three do not so hold. Of those, two did include damage, as well as equitable, claims, but the courts dismissed them because §1341 deprives federal courts of jurisdiction over actions to enjoin state tax matters; neither court addressed the proper treatment of damage actions. *Hickman* v. *Wujick*, 488 F.2d 875 (2d Cir. 1973); *Horn* v. *O'Chesky*, 378 F. Supp. 1280 (D.N.M. 1974). In the third case, the court expressly stated that §1341 does not necessarily bar actions for damages. *Ludwin* v. *City of Cambridge*, 592 F.2d 606, 609 (1st Cir. 1979).

Because the support for Respondents' interpretation is thin, they disparage the judicial support for federal jurisdiction over tax related damage actions as insubstantial and shallow. Comparison of the cases yields a contrary conclusion. First, consider

two opinions that extended the Act's jurisdictional bar to actions for damages. *Fair Assessment in Real Estate Association* v. *McNary*, 478 F. Supp. 1231 (E.D.Mo. 1979), *aff'd*, F.2d (8th Cir. 1980); Pet. App. at A-4; *Advertiser Co.* v. *Wallace*, 446 F. Supp. 677 (M.D. Ala. 1978).

The *McNary* decision offers little guidance: the district court treated the damage suit as a tax refund action and simply applied the reasoning of the tax refund cases. 478 F. Supp. at 1233; Pet. App. at A-7. The court in *Advertiser* did address the impact of §1341 on damage actions, but it treated the damage action as an analog to tax refund proceedings and, for support, relied almost exclusively upon tax refund cases. *See* 446 F. Supp. at 679-80. Beyond tax refund cases, that court consulted only note 17 to Justice Brennan's concurring opinion in *Perez* v. *Ledesma*, 401 U.S. 82, 127 n.17 (1971).

Without more than a cursory acknowledgement of the distinctions between damage actions on the one hand and tax refund suits and anticipatory suits on the other, the court in *Advertiser* made an analytical leap to extend the bar to damage actions. Speculating that the threat of liability would deter tax officials from assessing and collecting taxes, it concluded that damage actions would impermissibly "restrain" tax collection. *Advertiser*, 446 F. Supp. at 680. Last, the district court determined that it could not grant relief that included the amount of the plaintiff's tax liability and therefore could grant no relief at all. *Id.*

At most, the solitary case that has barred damage actions qua damage actions on the basis of the Tax Injunction Act is an isolated decision by a lower court not even accepted in its own circuit. In a subsequent case involving prayers for injunctive and declaratory relief as well as damages, the Fifth Circuit totally ignored the *Advertiser* decision and confined itself to a narrow view of the damages question. *See A Bonding Co.* v. *Sunnuck*, 629 F.2d 1127, 1132-33 (5th Cir. 1980). *Accord, Ludwin* v. *City of Cambridge*, 529 F.2d 606 (1st Cir. 1979).

In marked contrast to the haphazard analysis of the *Advertiser* decision, the Seventh Circuit in *Fulton Market Cold Storage Co.* v. *Cullerton,* 582 F.2d 1071 (7th Cir. 1978), followed the traditional analytical steps, reviewing legislative history, historical background, pertinent judicial interpretation, and underlying policy considerations. That court separated challenges to the validity of state tax laws from complaints of individual misconduct causing constitutional violations and concluded that the former belong in state courts, the latter, at least in part, in federal. *Id.* at 1078. Such assignment of state law questions to state courts and federal questions to federal courts reflects both the design envisioned by the framers of §1341, *see* 81 Cong. Rec. 1415, 1416 (Feb. 19, 1937), and the remedial purposes of §1983. *Id.*

The Seventh Circuit addressed the expressed concern that the threat of liability might deter tax collection and recognized that the availability of qualified immunity for tax officials would preclude that effect. *Id.* at 1080. Immunity shields public officials—from governors to tax collectors—so that they may perform their duties without "undue timidity." *Wood* v. *Strickland,* 420 U.S. 308, 321 (1975).

Unlike *Advertiser,* the *Fulton Market* decision does not stand alone. In the most recent interpretation of the scope of the Act's prohibition, rendered too late for reference in Petitioners' brief in chief, the Sixth Circuit followed a like analysis and also rejected application of the bar to an action for damages arising from tax official misconduct. *Northwood Apartments* v. *LaValley,* 649 F.2d 401 (6th Cir. 1981).

CONCLUSION

For the reasons stated above and in Petitioners' brief in chief, Petitioners respectfully request that the Court reverse and vacate the order of the Court of Appeals for the Eighth Circuit and direct that court to remand the matter to the district court for trial on the merits.

Respectfully submitted,

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